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Honorable Fred V. Smith
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Prisons and Prisoners -
Felons - Use of Force -
Department of Corrections

Deadly force, which apparently includes any discharge of a firearm at a person, may be used to prevent escapes and recapture escapees only if such escapees are "dangerous." "Dangerousness" discussed.

Dear Mr. Smith:

Your July 23, 1985, letter requested our informal opinion in answer to the question of what force may be used to prevent escapes from penal facilities or to recapture escaped convicts.

The leading case regarding this matter, is Tennessee v. Garner (471 U.S. ___, 85 L.Ed.2d 1, 105 S.Ct. 1694 [1985]). As a May 13, 1985, staff analysis of Bill # P.C.B. 0012 for the Florida House of Representatives Committee On Criminal Justice observes on the Garner case:

"...[T]he reader should bear in mind that the Garner decision turned on its own facts and had they been slightly different in any critical respect, the outcome of the case

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might have been entirely different...." (Page 3, emphasis supplied)

The facts in Garner were these: A Memphis police officer investigating a burglary observed a suspect fleeing from the building. The officer could see the suspect well enough to determine that he was young, slight and had no weapon in his hands. The officer was "...reasonably sure' and 'figured' that Garner [the suspect] was unarmed...." (85 L.Ed.2d 1, 5) When the officer saw that he could not otherwise stop Garner, he shot for the upper part of Garner's body; the bullet struck Garner in the head, killing him. In Garner, the Supreme Court wrote:

"...[N]otwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment. Against these interests are ranged governmental interests in effective law enforcement...." (85 L.Ed.2d 1, 8)

"...Without in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects..

The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion...." (emphasis supplied)

The Supreme Court's references to the use of deadly force defeating the judicial process, would not apply to escaped convicts who by definition had already been

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through the process. However, in Ayler v. Hopper (532 F.Supp. 198 [M.D.Ala., 1981]; cited with approval in Acoff v. Abston, 762 F.2d 1543, 1549 [11th Cir., 1985]) the Court disallowed the use of firearms in apprehending escaping convicts.

The U. S. Supreme Court in Garner also wrote:

"...Petitioner and appellant have not persuaded us that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life.

"The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects...." (85 L.Ed.2d 9-10; emphasis supplied)

In Garner the officer intended to kill the suspect, shot to kill and did kill. Throughout the Garner opinion, the Supreme Court referred to deadly force in terms of the taking of life ("killing," "die," "shooting him dead," etc.). Does this mean that the Supreme Court equates "deadly force" with force which is calculated and intended to kill? Maybe, but in Ayler, above and Pruitt v. Montgomery (M.D. Ala. No. CV. 83-T-903-N), appeal pending, the Court equated the use of firearms with deadly force without regard to the officer's intentions nor how the firearms were used nor the actual effect of their use.

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The latest case in point is Acoff v. Abston (762 F.2d 1543 [11th Cir., 1985]). In Acoff an officer shot at a fleeing burglar, because the officer had heard a shot and thought that the burglar had shot the officer's partner. The officer could see objects in the burglar's hands, but could not tell what they were. The Eleventh Circuit ruled that the officer's liability was a question for the jury.

From these cases the following general principles can be distilled:

Deadly force, which apparently includes any use of firearms against a person, may not be used except against dangerous felons. A "dangerous felon" may be one who threatens the officer with a weapon or who has committed a felony involving the infliction or threatened infliction of serious physical harm (Garner, 85 L.Ed.2d 1,10) or may be limited to felons who threaten "...imminent or at least a substantial likelihood of, death or great bodily harm...." (Ayler, 532 F.Supp. 198, 201)

We turn now to your particular questions which relate to the force which may be used to prevent escapes and recapture escapees from various types of confinement. However, we must first note that no force is authorized against escapees beyond what is necessary to prevent the escape or make the capture. What we write below assumes that the force in question is necessary.

1. We address first the question of the use of deadly force by an officer in defense of self or an innocent third party. An officer surely has the same rights in this regard as any citizen. See Section 13A-3-23, Code of Alabama, 1975. In such a situation an officer, unlike a citizen, need not retreat. Section 13A-3-23(1)(b). In addition, an officer is justified in using deadly physical force to the extent he or she reasonably believes that such is necessary to defend himself or herself or an innocent third party from the use of imminent use of deadly physical force. Section 13A-3-27(b)(2). "Deadly physical force" is defined as force which is readily capable of causing death or serious physical injury. Section 13A-3-20(2).

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2. What force may be used to overcome the resistance of escapees from the S.I.R. program? Escaping from the SIR program is like "escaping" from probation. It is most difficult to see how an argument could be made that a person, who has been placed at large in the community by the Department of Corrections, is, without more, such a dangerous criminal that deadly force is justified if necessary to return him to the S.I.R. program. This is not to say that such escapees are never dangerous. Other factors, such as their being armed or violent acts committed incident to the escape or while they are at large, might well justify judging them to be dangerous.

3. What force may be used to overcome resistance of escapees from a trustee barracks or a community based facility? Here again, we find it difficult to see how a convict who is allowed at large in the community by the Department of Corrections, is nonetheless dangerous enough, without more, to justify the use of deadly force to prevent his escape or return him to custody. This is not to say that such escapees are never dangerous. Other factors, such as their being armed or violent acts committed incident to the escape or while they are at large, might well justify judging them to be dangerous.

4. What force may be used to overcome the resistance of an escapee from a major detention facility, wherein the custody status may be minimum to maximum? The question here is whether such an escapee is dangerous. That determination depends on all the facts and circumstances including, but not limited to, the inmate's custody classification and the type of facility involved. Unfortunately, at this time in the post-Garner era, it is impossible to be more specific.

In the final analysis, the abolition of the Common Law Rule has left us without any clear idea of when deadly force may be used in many cases.

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If our office can be of further assistance, please
do not hesitate to contact us.

Very truly yours,

Charles A. Graddick
Attorney General

By:

A handwritten signature in cursive script, reading "Lynda Oswald".

Lynda Oswald
Assistant Attorney General

LKO/dn